No. 550.

FILED,
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JAMES H. McKENNEY
CLERK.

Brf. of Luckett for Appellees.

United States Supreme Court.

OCTOBER TERM, 1897.

Filed Mar. 8, 1898.

P. H. KIRWAN, U. S. Surveyor General for Minnesota, *et al.*, *Appellants*,
vs.
SIMON J. MURPHY, *et al.*, *Appellees.*
} No. 550.

Motion by Appellees to Dismiss Appeal and Brief in Support of Same.

HENRY N. COPP,
S. D. LUCKETT,
Att'ys for Appellees.

In the United States Supreme Court.

P. H. KIRWAN *et al.*
vs.
SIMON J. MURPHY *et al.*
No. 550. October Term, 1897.

HON. J. K. RICHARDS,
Solicitor-General.

SIR:

Please take notice that on Monday, March 21, 1898, at the opening of Court or as soon thereafter as counsel can be heard, we shall submit to the Court a motion in the above cause to dismiss the appeal. Copy of the motion and the brief thereon is attached hereto.

Very respectfully,

HENRY N. COPP,
S. D. LUCKETT,
Att'ys for Appellees.

Copy of the above notice with copy of motion and appeal attached received this 26th day of February, 1898.

J. K. RICHARDS,
Solicitor-General, U. S., Att'y for Appellants.

IN THE UNITED STATES SUPREME COURT.

October Term, 1897.

P. H. Kirwan, U. S. Surveyor General for Minnesota, and Thomas H. Croswell, *Appellants,* vs. Simon J. Murphy *et al.*, *Appellees.*	}	No. 550.

MOTION TO DISMISS APPEAL.

Comes now the appellees and respectfully move the Court to dismiss the attempted appeal in this cause from the decision of the Circuit Court of Appeals for the Eighth Circuit, because as appellees verily believe, this Court has no jurisdiction of said cause and because no appeal would lie from the decision of said circuit court of appeals to this Court for the following reasons, to wit:

1. The judgment of the Circuit Court for the District of Minnesota, Fifth Division, from which appeal was taken to said circuit court of appeals, was wholly interlocutory in character and the decision of said circuit court of appeals from which an appeal to this Court is attempted to be taken simply affirms said interlocutory decision and remands the cause to the circuit court for farther proceedings.

2. The appeal in this cause from the said circuit court to the said circuit court of appeals, being from an interlocutory order of said circuit court, continuing an injunction, could only have been taken under Sec. 7, of the Judiciary Act of March 3, 1891 (26 Stat., 828), and from the decision of a

circuit court of appeals, on a case coming to it under said section, no right of appeal to this Court is given.

Wherefore, appellees ask that said appeal be dismissed and they pray judgment for their costs laid out and expended herein.

Respectfully submitted,

HENRY N. COPP,
S. D. LUCKETT,
Attorneys for Appellees.

STATEMENT OF THE CASE.

The appellees, plaintiffs below, sued the appellants, defendants below, in the U. S. Circuit Court for the District of Minnesota, Fifth Division. Their bill of complaint (Printed Record, p. 1 *et seq.*) alleges in substance that they, plaintiffs, are the owners of certain lands specifically described in the bill, lying in St. Louis County, Minn., abutting on the shores of Cedar Island Lake; that in 1876 the township in which said lands lie was surveyed and the survey approved by the U. S. Surveyor-General for Minnesota, and by the Commissioner of the General Land Office; that prior to April 1, 1887, all the lands in said township were sold or otherwise disposed of by the United States, according to the official plat of said survey, and patents therefor were issued to the various purchasers and entrymen; that said Cedar Island Lake, lying in said township is, in fact, smaller than it is represented to be on said plat, and that several of the fractional lots owned by plaintiffs, about said lake, contain more land than is represented on the plat, while as to some of said lots, the waters of the lake extend upon the areas shown by the plat to be land; that the said lands owned by plain-

tiffs, lying between the original meander line and the actual shore line of the lake, now claimed by defendants to be unsurveyed, are of the value of over $2,000.

It is further alleged (p. 7) that plaintiffs became the owners of the lands first described in the bill, with other lands, by virtue of mesne conveyances from the patentees to themselves; that they paid a valuable consideration for each parcel for the estimated quantity of pine timber standing thereon, extending to the actual waters of the lake; that they purchased the same in good faith, believing the title of their grantors extended to the lake, relying upon said Government plat and being then in ignorance of any fraud or mistake in the survey, and that they only learned of the same from an application for a resurvey. Then follows a recital of certain facts which induced plaintiffs to purchase said lands, but which are unnecessary to the presentation of the questions raised by the present motion.

It is then alleged that proceedings were had to secure the survey of the lands between Cedar Island Lake and the old meander line, and that on October 31, 1895, the Commissioner of the General Land Office instructed the appellant Kirwan (defendant below), the Surveyor General of Minnesota, to cause a contract to be made with a deputy surveyor to survey said lands, which order was affirmed by the Secretary of the Interior, and final instructions for such survey given to the Surveyor General on November 5, 1896; that said Kirwan thereupon let the contract to make said survey to his co-appellant, defendant below, Thomas Croswell, who is about to commence such survey.

Facts are then alleged upon which it is prayed that the defendants be enjoined from entering upon said lands for the purpose of surveying the same or from taking any steps under their contract.

In support of the bill are filed bulky exhibits and affi-

davits, but they have not been printed, as they are not essential to the presentation of the motion.

On December 21, 1896, Judge Lochren signed an order directed to the defendants to show cause on January 7, 1897, at Chambers, why a "temporary injunction" should not issue on the complaint, and restraining them, until further orders from the court, from proceeding under their contract. (P. 11.)

On January 7, 1897, the parties appeared before Judge Lochren, holding court at Minneapolis in the Fourth Division. A motion by defendants to discharge the rule was denied, and after a hearing on the bill and exhibits and the return to the rule the matter was taken under advisement. (P. 12.)

Thereupon defendants, on January 11, 1897, filed their joint answer to the bill. (Pp. 13 to 19.)

On January 22, 1897, plaintiffs filed their replication, putting the case at issue. (P. 20.)

On April 3, 1897, the circuit court granted plaintiffs' prayer for a temporary injunction and an injunction was ordered to issue on the filing of bond by plaintiffs, restraining the defendants "during the pendency of the above entitled action or until the farther order of this court," from proceeding with the survey of said lands. (P. 21.)

On April 10, 1897, a "temporary injunction" was issued and served on defendants. (P. 22.) On the same day the appellants filed their appeal to the circuit court of appeals. (P. 23).

In the circuit court of appeals the case was submitted on elaborate arguments, both printed and oral, resulting in an opinion delivered by Riner, District Judge, affirming the judgment of Judge Lochren, and remanding the case for farther proceedings in the circuit court. The opinion of Judge Riner is printed in the record (P. 27 *et seq.*) and the

order of the circuit court of appeals remanding the case to the circuit court for farther proceedings is found at P. 33.

Thereupon, an attempt was made by the U. S. Attorney for Minnesota to bring the case here on appeal from the decision of the circuit court of appeals and appellees have moved to dismiss the same, having at their own expense ordered so much of the record printed as will present the questions raised by their motion.

ARGUMENT.

No question arises, on this motion, as to the merits of the case or the questions of law, interesting as they are, discussed in the able opinion of Judge Riner which appears in the record. The sole questions now are: 1. Does this Court have jurisdiction of this cause at this stage of the proceedings? 2. Does an appeal lie to this Court from the decision of a circuit court of appeals in a case that goes to such court under Sec. 7 of the Judiciary Act of March 3, 1891? That these questions should be answered in the negative is the contention of appellees.

I.

The Appeal is from an Interlocutory Decision.

The record, as recited in the statement of the case, shows that it went to the circuit court of appeals from an interlocutory order, directing the issuance of a temporary injunction and overruling a motion to discharge the restraining order. This order was affirmed by the circuit court of appeals, leaving the temporary injunction in force and remanding the case for farther proceedings. It has not been tried yet and is still pending in the circuit court as a case in which no final decree has been rendered and there is no

final decree in this record from which an appeal could be taken to this Court.

The last paragraph of the opinion of the circuit court of appeals is as follows (P. 33 of Record):

"In view of these considerations, we are not satisfied that an error was committed, in awarding a temporary injunction. It cannot be said, we think, that the injunction was improvidently issued, and the order appealed from is therefore affirmed."

And the order made in the decree appealed from which was rendered on this opinion, after the formal parts (P. 33), was as follows:

"On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order and decree of the said circuit court awarding a temporary injunction in this cause be, and the same is hereby, affirmed without costs to either party in this court, September 27, 1897."

We will not take space to cite all of the hundreds of cases in which this Court has been called upon to determine what is and what is not a final decree or judgment within the meaning of the statutes governing appeals and writs of error. It is fully settled that an order or decree overruling a motion to dissolve a temporary injunction or granting continuing or refusing a temporary injunction is an interlocutory order from which no appeal lies to this Court.

Young *vs.* Grundy, 6 Cranch, 51;
Gibbons *vs.* Ogden, 6 Wheat., 448;
McCollum *vs.* Eager, 2 How., 61;
Verden *vs.* Coleman, 18 How., 86;
Thomas *vs.* Wooldridge, 23 Wall., 283;
Buffington *vs.* Harvey, 95 U. S., 99.

It makes no difference that the present appeal is from the decision of an intermediate appellate court. The rule is that

the decree of an appellate court, remanding a case for farther proceedings by the inferior tribunal, is not final.

Gibbons *vs.* Ogden, 6 Wheat., 448;
Pepper *vs.* Dunlap, 5 How., 51;
Reddall *vs.* Bryan, 24 How., 420;
Moore *vs* Robbins, 18 Wall., 588;
Dist. of Columbia *vs.* McBlair, 124 U. S., 320;
Smith *vs.* Adams, 130 U. S., 167.

The recent decision of this Court in Smith *vs.* Vulcan Iron Works, 165 U. S., 518, seems to have no bearing on this branch of the motion. It was held in that case that on appeal to a circuit court of appeals, taken under the seventh section of the act of 1891, that court might dispose of the entire controversy and was not limited to questions arising solely with regard to the injunction. But in the case at bar the appellate court affirms the lower court and directs farther proceedings. No attempt was made to render a final decree, disposing of the entire controversy.

II.

No Appeal Lies to this Court in Cases Going to the Circuit Court of Appeals under the Seventh Section of the Judiciary Act of 1891.

This Court has "only such appellate jurisdiction as has been conferred by Congress." (United States *vs.* Young, 94 U. S., 258, and cases there cited: *Ex parte* Bollman, 4 Cranch, 93.) Has Congress conferred such jurisdiction in a case going to the circuit court of appeals, on an interlocutory order, under the seventh section of the judiciary act of March 3, 1891? We think not. It must be found, if at all, in the express language of the act.

By Sec. 6 of that act the usual appellate jurisdiction of the new circuit court of appeals is limited to the power "to review by appeal or by writ of error *final decisions* in the

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district court and the existing circuit courts," except in cases coming within Sec. 5, which are appealable direct to this Court. The same rule, therefore, is prescribed with reference to the character of decrees and judgments from which appeal or writ of error lies to those courts that was prescribed by the judiciary act of 1789, for this Court. But by Sec. 7, an exception is declared in injunction proceedings and an appeal permitted from an interlocutory order or decree to the circuit court of appeals but none is allowed, by that section or any other, from the decision of the circuit court of appeals to this Court, in such a case.

The right of appeal to this Court from the circuit court of appeals is given by the last paragraph of Sec. 6 of the act of 1891, "in all cases not hereinbefore, in this section made final," "where the matter in controversy shall exceed one thousand dollars besides costs." This necessarily has reference to such cases, only, as are made appealable to the circuit court of appeals in the beginning of Sec. 6, viz: to cases in which final decisions have been rendered in the lower courts.

As it required an express provision in the statute to enable an appeal to be taken from an interlocutory decree to the circuit court of appeals, so it would require an express provision to authorize an appeal to this Court. Its omission is a conclusive indication of the legislative intent not to confer appellate jurisdiction on this Court, in such cases.

We have contended under our first specification that the decision of the circuit court of appeals, in the case at bar was interlocutory, but if it should be held otherwise it would not follow that an appeal would lie to this Court. It is held by this Court, in Smith *vs.* Vulcan Iron Works, 165 U. S., 518, *supra*, that a circuit court of appeals has jurisdiction of the whole case in an appeal under Sec.

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7 of the act of 1891, and may render a decision disposing of the case. In the case at bar, however, the appellate court did not undertake to do this but affirmed the interlocutory decree of the circuit court and remanded the case "for farther proceedings."

The case just cited came to this Court on certiorari proceedings under Sec. 6, of the act of 1891, it being a patent case, and one of the classes of cases in which the decision of the circuit court of appeals is made final.

In Mills *vs.* Green, 159 U. S., 651, an appeal to this Court was taken from the decision of the Circuit Court of Appeals for the Fourth Circuit, making an order which disposed of the entire case. A motion to dismiss the appeal was sustained, but on different grounds from the present contention, although the same point was raised by counsel in that case. (See p. 5 of brief in support of that motion.) We know of no instance in which the right of appeal to this Court has been recognized in a case which went to a circuit court of appeals under Sec. 7 of the act of 1891.

The case of McLish *vs.* Roff, 141 U. S., 661, sustains both branches of this motion, in the reasons given for the conclusion there reached, although that case came up under Sec. 5 of the act of 1891. That was an attempt to bring the question of the jurisdiction of the United States Circuit Court for Indian Territory before this Court, by writ of error, in a case in which no final decision or judgment had yet been rendered. It was said by the court that the terms "appeals" and "writs of error" as used in Sec. 5 of that act must be understood to "mean the proceedings by which a cause, in which there has been a final judgment, is removed from a court below to an appellate court for review, reversal or affirmance." The opinion proceeds, then, to discuss the objects of Congress in passing the act of 1891, creating the new intermediate appellate court, and shows that the primary

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object was to relieve this Court from the "enormous overburden of suits and cases" that had resulted from the rapid growth of the country. In speaking of the distribution of appellate jurisdiction it is said in the opinion:

"But as to the mode and manner in which these revisory powers may be invoked, there is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgment upon them."

So we say, by a parity of reasoning, keeping in view the object sought to be reached by this act of 1891, there is no provision in the act which "can be construed into so radical a change" in the settled practice of this Court as to confer appellate jurisdiction upon it in any case, prior to its final decision in the lower courts in the absence of an express declaration in the act. Section 7 of the act is permissive in character. Parties waive no rights by not availing themselves of its provisions. They can await the final disposition of a case and then take the entire record to the circuit court of appeals and from that court to this. The provisions of that section are exceptional in character. It is complete in itself. The remedy conferred by it is not to be extended by implication. While Congress would doubtless have the power to give this Court jurisdiction at this stage of an injunction proceeding, the object of Congress in passing the act of 1891, was to relieve this Court and not to increase its burdens and hence the act should not be so construed as to extend the right of appeal, in a class of cases in which it has never, heretofore, been given, in the absence of express language to that effect.

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In support of this contention we also call attention to the following decisions

Am. Const. Co. *vs.* Railway Co., 148 U. S., 372;
Durham *vs.* Seymour, 161 U. S., 235.

We ask that the appeal be dismissed with costs.

Respectfully submitted,

HENRY N. COPP,
S. D. LUCKETT,
Att'ys for Appellees.

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